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Supreme Court, U.S.
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No. 93-1139

In The

# Supreme Court of the United States

October Term, 1993

BUDDY HERNANDEZ,

*Petitioner,*

v.

SUPERINTENDENT, FREDERICKSBURG RAPPAHANNOCK JOINT SECURITY CENTER, CIRCUIT COURT FOR THE CITY OF FREDERICKSBURG, AND ATTORNEY GENERAL OF VIRGINIA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

SHOULD THE DEFENSE IN A CRIMINAL CASE BE ALLOWED TO STIPULATE THAT THE PROSECUTION CAN PROVE ALL THE ELEMENTS OF THE OFFENSE CHARGED AND THEN, AFTER ITS "CONSTITUTIONAL" DEFENSE HAS FAILED, COMPLAIN ON FEDERAL HABEAS CORPUS THAT THE STATE'S PROOF WAS INSUFFICIENT AFTER ALL BECAUSE ***THE DEFENSE*** HAD MISCONSTRUED THE ELEMENTS OF THE OFFENSE?

## REASONS FOR DENYING THE WRIT

Buddy Hernandez was convicted in the Circuit Court for the City of Fredericksburg, Virginia, on February 15, 1990, of having violated § 18.2-422 of the Code of Virginia, which makes it illegal to wear a mask in public with the intent to conceal one's identity. Hernandez now asks this Court to review the actions of the United States Court of Appeals for the Fourth Circuit which affirmed the denial of his federal habeas petition by the United States District Court for the Eastern District of Virginia. *Hernandez v. Superintendent*, Nos. 92-6980 and 92-7139 (4th Cir. 1993) (UP) (Pet's App. at A-56). This is a simple case, however, and the petitioner's argument is simply wrong.

Hernandez' lawyer gratuitously and spontaneously acknowledged at the start of the trial that the Commonwealth could prove that the petitioner had violated § 18.2-422:

> [T]here's no factual contest regarding the commission of the offense charged, and the sole defense, indeed, is a constitutional defense. I can at this point, perhaps, give the Commonwealth a hand by stipulating on behalf of the defendant, Buddy Hernandez, that being over sixteen years of age, he did wear the hood or other devise whereby a substantial portion of his face was hidden or covered, so as to conceal his identity and did appear in a public place in the City of Fredericksburg, on or about August 13th, 1989. These facts are not at issue, ***and a prima facie case is conceded. * * * I don't know if there is anything that the government needs to proceed with since we essentially stipulate to the facts in the case.***

(TR. 12/19/89 at 48-49) (emphasis added). The trial thus proceeded solely in the context of the petitioner's "constitutional defense." This argument, however, was rejected by the court, and he was convicted of violating the statute and given a suspended sentence.

Hernandez argued to the Virginia Court of Appeals that § 18.2-422 was unconstitutionally overbroad on its face. That court, however, rejected his broad reading of the statute, instead holding that, "to violate the statute, an individual must ***intend*** to conceal his identity by covering his face." *Hernandez v. Commonwealth*, 12 Va. App. 669, 672, 406 S.E.2d 398, 400, *appeal refused*, Virginia Supreme Court No. 911102 (1991) (emphasis in original).

The petitioner then complained on federal habeas corpus that the Virginia Court of Appeals had "added" an intent element to § 18.2-422 of which he had not been aware, which had not been litigated at trial and which the evidence supposedly was insufficient to prove. Not surprisingly, the district court found that Hernandez had waived any such complaint because ***the defense*** had conceded a *prima facie* violation of the statute:

> By stipulating to a *prima facie* case, petitioner effectively admitted all elements of the offense. In so doing, he essentially assumed the risk that subsequent courts might view the statute differently from the way he then interpreted it. Admittedly, counsel's stipulation of a *prima facie* case does not specifically mention the element of intent. But petitioner cannot be permitted to stipulate to a *prima facie* case and then, when the constitutional defense fails, seek to attack collaterally the sufficiency of proof on an element of the offense.

*Hernandez v. Superintendent*, 800 F. Supp. 1344, 1352 (E.D. Va. 1992) (Pet's App. at A-53).*

Hernandez now complains that the district court and Fourth Circuit wrongly rejected his argument about the "intent" element of § 18.2-422 which, according to him, the Virginia Court of Appeals invented out of whole cloth. The fact that § 18.2-422 makes it illegal to wear a mask only when it is intended to conceal the wearer's identity, however, which Hernandez claims first appeared at the appellate level, was of course not "new" at all: The statute on its face makes it illegal to wear a mask covering one's face only if it is done "so as to conceal your identity," and the "[i]ntent thereby to conceal his identity" is an "obvious" implied element of every anti-mask regulation even when not mentioned at all in the provision. *Application of Martin*, 34 Cal. Rpt. 299, 301 (Cal. App. 1963). *See State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990) (conviction under anti-mask statute like Virginia's "requires the state to prove that the mask is worn with an intent to conceal the identity of the wearer.") Indeed, it is not unusual for a statute to fail to expressly list every element of the crime. *See, e.g., Ginsberg v. New York*, 390 U.S. 620 (1968) (this Court refused to decide whether State had proven beyond reasonable doubt an unstated scienter element after rejecting defendant's overbreadth argument).

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* The district court also found Hernandez' constitutional argument to be without merit. The petitioner did not appeal that issue to the Fourth Circuit and expressly disavows it here. (Pet. at 9 n.3).

The simple truth of the matter is that the reason that this was not an issue at Hernandez' trial is, as the district court found, because ***the defense*** stipulated at the start of the proceedings that Hernandez' wearing of the mask violated the statute and established a *prima facie* case against him, his only defense being a "constitutional" one. The effect of Hernandez' contention would be that, every time a criminal defendant overstates the breadth of a statute in order to support his "constitutional" argument, he could not be convicted when the provision is determined to be more narrow than he contends, which usually is the case. Yet, it is elementary that "[s]tipulations as to facts freely and voluntarily entered into during trial are the equivalent of proof and on appeal neither party will be heard to suggest that the facts were other than as stipulated," *United States v. Campbell*, 453 F.2d 447, 451 (10th Cir. 1972) (defendant cannot claim on appeal that evidence was insufficient after he stipulated critical proof at trial), and that stipulations are binding on the parties who make them. *United States v. Saunders*, 886 F.2d 56, 59 (4th Cir. 1989). In short, having stipulated to evidence at trial, a defendant cannot complain on appeal about the prejudicial effect of its introduction. *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986).

## CONCLUSION

Apparently what has happened here is that the defense misread the requirement of § 18.2-422 at trial and now regrets its stipulation of a *prima facie* case. An accused, however, "assumes the risk of ordinary error in . . . his attorney's assessment of the law or facts."

*McMann v. Richardson*, 397 U.S. 759, 775 (1970). In any event, neither the district court nor the Fourth Circuit analyzed Hernandez' argument in the context of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1988), as the respondents had requested them to do. The district court and Fourth Circuit thus rejected the petitioner's argument under a more beneficial standard of review than that to which he was entitled. This case is not even a close call under a correct application of the "new rule" doctrine, and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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